# ARKANSAS COURT OF APPEALS

DIVISION IV
**No.** CA08-21

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| | **Opinion Delivered** OCTOBER 22, 2008 |
| KARLA S. HANDLEY<br>APPELLANT | APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT, |
| V. | [NO. E-97-1324-1] |
| | HONORABLE ROBIN MAYS, JUDGE |
| THADDEUS HANDLEY<br>APPELLEE | AFFIRMED |

**ROBERT J. GLADWIN, Judge**

Appellant Karla S. Rice (formerly Handley) appeals the October 5, 2007 order of the Jefferson County Circuit Court granting a permanent change of custody of the parties' two minor children to appellee Thaddeus Handley. She contends that appellee failed to prove by a preponderance of the evidence the following: 1) a material change in circumstances; 2) that a change in circumstances affected the best interests of the children; and 3) that she had failed to support the minor children. We affirm.

*Statement of Facts*

The parties were divorced by decree dated September 4, 1996, and appellant was awarded custody of the parties' two minor children, R.H. and T.H. Appellee was ordered to pay child support. On July 10, 2006, appellee filed a petition for contempt and motion for ex-parte temporary and permanent change of custody alleging that the children expressed a desire to live with him and that the parties' thirteen-year-old daughter, R.H., was allowed

to drive without supervision with her younger brother in the vehicle. Further, appellee alleged that R.H. was allowed to date and had been encouraged by appellant to do so. Finally, appellee alleged that appellant had exhibited numerous acts of violence and that appellant allowed the children to spend the night with various people and in environments that appellee felt were unhealthy and dangerous.

By order of August 16, 2006, appellee was granted temporary custody of the minor children, and appellant was granted visitation every-other weekend and overnight every Thursday. The trial court noted that R.H. had been driving a motor vehicle at the age of thirteen, and that appellant had allowed that pattern of behavior. The trial court stated that it was not responsible to allow R.H. to drive unsupervised, and it was not in the child's best interest and welfare to allow her to drive. The trial court took the issue of child support under advisement and admonished both parties that they had an independent duty to support their children. Appellee's child-support obligation was suspended under this temporary order.

At the final hearing held September 6, 2007, testimony revealed that during the pendency of the temporary order, on or about December 31, 2006, police were called to the home of appellant while she had the children for visitation. Appellant's husband, Derrick Rice, admitted calling the police when appellant, thinking her husband had shoved R.H., took a handgun from a drawer in her bedroom and asked him to allow her and the children to leave. Mr. Rice claimed that appellant never pointed the gun at him, and he admitted he had been drinking before he came home and tried to force appellant into conversation.

However, the police report indicated that appellant "pulled a pistol on him. He stated that she then stated that she was going to kill him."

Mr. Rice told the trial court that the children came into the bedroom when they heard the argument get louder, and that the children were telling him to leave appellant alone. He denied pushing R.H. into the door, although the police report of the incident stated that R.H. was pushed into the door with "such force that the door had a hole in it." Mr. Rice also stated that he lied to the police about what happened when they arrived at the scene, contending that appellant did not threaten to kill him. Mr. Rice admitted to having an alcohol problem and agreed to get help or do anything necessary that would allow appellant to have the children returned to her custody.

The trial court also heard evidence about a domestic incident that occurred between appellant and Mr. Rice on October 16, 2004, wherein he alleged at the time that appellant bit him and scratched his face. Mr. Rice called the police and a report was filed. The report indicates that Mr. Rice told police that his wife had attacked him with a paint can, had thrown an unknown object at him, and tried to set some of his clothes on fire. The report further indicates that Mr. Rice may not have been truthful about the way the bite took place. The report states, "The position that he showed me, how he was holding Mrs. Rice, she would not have been able to reach his arm in order to bite him."

Mr. Rice also called police and reported an incident on January 1, 2003, wherein he alleged that appellant had come after him with a hammer. Mr. Rice had a scratch from the hammer on the inside of his leg, which he reported to police occurred when he was trying

to get the hammer away from appellant. At the hearing, Mr. Rice denied being scratched by the hammer, stating he exaggerated to the police when he made the report. Appellant's children were not at the house during this incident. Mr. Rice told the trial court that he considered each incident to have been his fault, even though he was the one who called the police on each occasion.

The evidence related to R.H. being allowed to drive unsupervised was revisited at this hearing as well. Appellee testified that he helped his daughter obtain a hardship driver's license, although he had not allowed her to drive by herself yet, as he believed she was not ready. Appellee claimed that he was also concerned with disputes in the Rice household and appellant's "shaking that little girl" at the Cheer Challenge, which was described in a police report dated November 16, 2005. The report describes an incident wherein a girl's mother reported that appellant reprimanded the girl for being disrespectful, and the reprimand turned into appellant hitting the girl on the back of the head and slinging the girl.

Appellee described his concern with R.H. dating at such a young age and related an incident where appellant accompanied R.H. to a movie, and a boy, R.H.'s "date," was there. Appellant gave the boy a ride home, and stopped at appellee's home to introduce the boy to R.H.'s father. However, appellee refused to meet the boy. Further, appellee stated that appellant had allowed the children to spend the night with "various people in various environments" that he felt were not safe. He explained that because he was in law enforcement, he understood the dangers for children staying in homes where domestic disturbances had been reported. He also claimed that he was concerned with the progression

of the domestic violence in the Rice household. Appellee told the trial court that appellant had written him letters asking him to reunite and told the trial court he can only communicate with appellant when she is not hostile.

Appellant testified regarding the December 31, 2006 incident that Mr. Rice pushed R.H., causing a hole in the door. Appellant claimed that she did not point the gun at Mr. Rice, who had been drinking, but because she believed he had pushed her daughter, she took the gun from the drawer. She stated that she and Mr. Rice were still together and had not discussed the incident. She claimed that details were missing from the motion filed by appellee regarding this incident. She said, "I had the gun down and I said, 'Just let us out. That's all I want to do is get out of the house. Just let my children and I out.' That's all I can remember doing." She stated that she did not witness Mr. Rice pushing R.H., but heard the noise and heard her daughter say, "Don't touch me." She stated that she feared for her own safety and that of her children at the time. She testified that she got the gun because she was overwhelmed. She explained further:

> I lost the kids, so I don't even know what I was thinking. I wasn't thinking clearly. That's all I can say. I wasn't me because I had too much on me, so I just kind of overreacted, but when I came back to the house, I left the kids in the car. I just wanted to get some things, and then that's when he told me he called the police, so I was going to wait on the police to get there, so that I could get my things. He told me I could not come back in the house with the gun. I still had the gun because I didn't want him to trap me in the house again, so I took it with me, and then when he wouldn't let me in the house. He said, "You can't get in and get your things until you put the gun away," so I trusted him and think that he would do that, and so I put it back in the console and went back in, but by that time, he had called the police, so I just waited anyways. I didn't try to go back in. I just waited.

She claimed she and her husband have had spiritual counseling with their pastor and that their communication has improved since this incident. She also stated that Mr. Rice has not been intoxicated since this incident.

Appellant said she did not set Mr. Rice's clothes on fire in October 2004. She testified that she called Mr. Rice and told him she was going to do so, but when she went to the closet to use a cigarette lighter on Mr. Rice's clothes, it did not work. She claimed she had been painting her daughter's room, so she swung the empty paint can at Mr. Rice to get him away from her when he came home. When he pinned her down, she bit him and scratched his face, breaking her fingernail in the process. Appellant's children were not present.

Appellant explained that she did not hit Mr. Rice with the hammer during the incident of January 1, 2003. She claimed they were "tussling," and she had a hammer to protect herself. Appellant testified that her counselor explained that because she had been in an abusive relationship — with Mr. Handley — sometimes she did not communicate effectively and would have to learn to do so.

Appellant admitted that she let R.H. drive when R.H. was thirteen years old and stated that her parents taught her to drive at a young age. She said she stopped allowing it when the school principal, appellant's boss, said something to her about it. She then allowed Reverend Howard to pick her son up from school. She also helped R.H. study for her driver's test and took R.H. to get her driver's permit.

She explained that she reprimanded the child at Cheer Challenge because the child was causing confusion. She said that the reprimand escalated into "something totally different."

She denied that the incident became physical, explaining that she held the girl and talked to her like she would talk to her own child. She testified that she does not consider R.H. to be dating when she is chaperoning R.H. at a movie.

Appellant said that she was not required to pay child support by the trial court's temporary custody order. Her understanding of the trial judge's order was that they were both responsible for taking care of the children. She testified that she bought the children shoes and clothes and paid for their doctor bills, cheerleading fees, gymnastic classes, and haircuts. She claimed that she spent more than $100 per month.

The trial court granted appellee a permanent change of custody by order dated October 5, 2007. The order itself contains no findings of fact or statement as to the material change of circumstances found by the trial court. However, the trial judge stated at the conclusion of all the evidence that custody was being changed because appellant put her children in dangerous situations. The trial judge recounted the testimony regarding the incidents reported to police by Mr. Rice, and stated that she discounted his testimony because he said he had lied to the police. However, the trial court did note that Mr. Rice called the police on three occasions where there was physical abuse between the parties. She noted that the situations escalated from physical fighting and biting, to an incident involving a hammer, to an incident involving a gun.

The trial court noted, "[A]ny time you put a gun in a situation that it's volatile and has a person that has had too much to drink, everybody is at risk, everybody." The trial judge recognized that appellant admitted her child was driving at age thirteen. Further, the thirteen

year old was allowed to drive the younger sibling. The trial court determined this was dangerous for both children. The trial court indicated appellant testified that appellee had abused her during their marriage, but acknowledged the letters written to appellee by appellant asking him to reunite. The trial court noted that if appellee was an abuser and appellant wanted to go back to him, then appellant needed serious counseling. Further, the trial court said it was unclear who the aggressor was in the incidents of abuse, but that appellant was definitely escalating the incidents by using hammers and guns. The judge also noted that appellee had not been willing to reunite, and because he filed for the divorce, he had extricated himself from the abuse cycle. The trial court said to appellant, "If nothing else, you're overly dramatic and you're overly histrionic, and it gets to a level of danger for you and for your children."

The trial court ordered appellant to pay $269 bi-weekly child support for two children, making that amount retroactive to January 2007. Appellee was therefore awarded judgment for the retroactive support amount of $4304, to be paid bi-weekly at thirty-one dollars per payment. The trial court reasoned that appellant had done for her children what every non-custodial parent does, which is buy the children presents and clothes when necessary. The trial court warned appellant that if police were called to her house again, or if anymore abuse was known or reported, supervised visitation would be ordered. A notice of appeal was filed October 31, 2007, and this appeal timely followed.

*Standard of Review*

This court recently set forth our well-settled standard of review in cases involving a change of custody as follows:

> In reviewing [equity] cases, we consider the evidence de novo, but will not reverse a [trial court's] findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996). We give due deference to the superior position of the [trial court] to view and judge the credibility of the witnesses. *Noland v. Noland*, 330 Ark. 660, 956 S.W.2d 173 (1997). This deference to the [trial court] is even greater in cases involving child custody, as a heavier burden is placed on the [trial court] to utilize to the fullest extent [its] powers of perception in evaluating the witnesses, their testimony, and the best interest of the children. *Anderson v. Anderson*, 18 Ark. App. 284, 715 S.W.2d 218 (1986). Where the [trial court] fails to make findings of fact about a change in circumstances, this court, under its de novo review, may nonetheless conclude that there was sufficient evidence from which the [trial court] could have found a change in circumstances. *Campbell v. Campbell*, 336 Ark. 379, 985 S.W.2d 724 (1999); *Stamps v. Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988). Our law is well settled that the primary consideration in child-custody cases is the welfare and best interest of the children; all other considerations are secondary. *Digby v. Digby*, 263 Ark. 813, 567 S.W.2d 290 (1978). A judicial award of custody should not be modified unless it is shown that there are changed conditions that demonstrate that a modification of the decree is in the best interest of the child, or when there is a showing of facts affecting the best interest of the child that were either not presented to the [trial court] or were not known by the [trial court] at the time the original custody order was entered. *Jones*, 326 Ark. 481, 931 S.W.2d 767. Generally, courts impose more stringent standards for modifications in custody than they do for initial determinations of custody. *Id.*

*Harrison v. Harrison*, ___ Ark. App. ___, ___, ___ S.W.3d ___, ___ (Sept. 17, 2008) (citing *Hamilton v. Barrett*, 337 Ark. 460, 465-66, 989 S.W.2d 520, 523 (1999)).

*I. Material Change of Circumstances*

Appellant contends that her one misjudgment in allowing her thirteen-year-old daughter to drive should not amount to her losing custody. She allows that it was a bad decision, but argues that an error in judgment by a parent should not automatically result in

a change of custody. She maintains that when Reverend Howard came forward and offered to pick up T.H. after school, she was pleased and arranged for that to happen.

Appellant argues that any abuse that occurred was initiated by Mr. Rice. She claims that she never hit him with a hammer and that she only told her husband she was going to set his clothes on fire, but she did not burn his clothes. She maintains that her children were not even present during the incidents occurring in 2003 and 2004. She argues that she was under a lot of stress during the most recent incident and that when she feels trapped she does not handle the situation well because appellee physically abused her in the past.

Appellant maintains that the trial court abused its discretion by arbitrarily discounting the testimony of her witnesses concerning her ability to parent. She recounts her mother's testimony regarding her happy marriage and her ability to care for the children. She adds that the gun has now been removed from the home.

She also points to the testimony of her friend of twenty years, Kellye Luckett. Ms. Luckett described appellant as giving and kind hearted. She testified that appellant is well-liked by the students and parents at the school where she teaches. She described how appellant stepped in to care for her and her children when Ms. Luckett was diagnosed with a brain tumor. Ms. Luckett claimed that appellant has a loving relationship with Mr. Rice, as do her children.

Appellant maintains that the testimony of Chanta Pulliam was arbitrarily disregarded as well. Ms. Pulliam testified that she has known appellant all her life, and that appellant is the best mother and always puts her children first. She felt that the children were still in a safe

environment with appellant, even though appellant pulled a gun. She testified that she saw appellant with bruises from the first marriage, and that appellant was the one who broke the cycle of abuse by leaving Mr. Handley.

Appellant claims that her children were making good grades when she had custody of them. Since the temporary change of custody, she argues that their academic progress has been stifled. T.H. finished the last semester of 2007 with three Ds. Appellant points out that she is involved, and that she would sit on the sideline during ball games and do homework to make sure that the work was finished.

Appellant argues that the dating issue was one of the reasons appellee moved for a change of custody. However, appellant testified that she did not want her daughter sneaking around with boys. She took the children to the movie and chaperoned them to keep her daughter from sneaking. She claims that she teaches her children abstinence in order that they might not make the same mistake she did in trying to grow up before her time.

Finally, appellant claims that the environment appellee provides her children is not stable. She argues that her daughter called her one night when appellee threw a table at his girlfriend, screaming on the telephone for appellant to come get her. She also claims that R.H. drives even though she is not sixteen because she has a hardship license. Appellant maintains that appellee may be fit to be the custodial parent of the children, but he has failed to prove a material change in circumstances.

Appellee argues that he proved a material change of circumstances by the preponderance of the evidence. We agree. The evidence was that appellant remarried since

the original custody determination in 1997. The trial court found that the marriage has become abusive with an escalating level of violence with each occurrence of abuse. The latest incident involved a gun and the minor children were present. Appellant has engaged in actions that have unnecessarily placed the minor children at great risk of serious bodily harm by allowing thirteen-year-old R.H. to operate a motor vehicle to pick up a younger T.H. from school. Therefore, the trial court was not clearly erroneous in changing custody to appellee as there was sufficient evidence that a material change in circumstances had occurred.

*II. Best Interest of the Children*

For a trial court to change the custody of children, it must first determine that a material change in circumstances has transpired from the time of the divorce decree and, then, determine that a change in custody is in the best interest of the child. *Lewellyn v. Lewellyn*, 351 Ark. 346, 93 S.W.3d 681 (2002). Appellant argues that she and her husband have been married for seven years and that her husband is employed at DHL Express. They have lived at their current address since 2003, and her husband has custody of his three children. Since 2003, they have had two domestic disputes and the police were called twice. Mr. Rice admitted to exaggerating the circumstances to police regarding the incident involving a hammer, and the parties have gone to counseling several times throughout the marriage. Both appellant and Mr. Rice testified that appellant has problems communicating and the arguments begin when he tries to make her talk to him.

She emphasizes that the children were making good grades while in her custody. She claims that both the children's grades have fallen since being in appellee's custody for a year.

She argues that appellee blames her for the fallen grades because the children are with her on Thursday nights. She counters that appellee has them six nights and should make sure they are ready for their tests on those nights as well.

Appellant claims that the incident occurred in December 2006 because she overreacted to what she perceived as a threat to her child. She argues that her children had already been taken away from her on a whim, so she could not allow any threat to her child to go unanswered. She admits that grabbing the gun created an element of danger, but claims she knew how to use a gun safely because she had formerly worked for the Arkansas Department of Correction. She claims that her emotions were boiling because she was going through a custody battle, and she thought her husband was engaging in raucous behavior that would jeopardize reversing the temporary custody order. She argues that Mr. Rice did the proper thing by not allowing the gun back into the house and calling the police to ensure a peaceful end to this episode.

Appellant claims that appellee has not presented any evidence that the health, welfare, or psychological stability of these children has been affected in anyway in the environment of her home. Both children testified at the temporary hearing that they wanted to remain with their mother. She argues that to uproot the children from her custody when the preponderance of evidence showed they were doing well and have not been psychologically or physically abused would be wrong.

However, appellee argues that he proved that the material change in circumstances affected the best interests of the children. The trial court found that appellant failed to protect

her minor children by allowing the thirteen year old to drive unsupervised to pick up her younger brother. The trial court also found that appellant failed to protect her children by escalating the level of violence in three separate domestic disputes by introducing a gun in one instance and a hammer in another. Appellant physically bit her husband as well. The trial court found that there was abuse happening in appellant's household, and it was not in the children's best interest to leave them with appellant. We hold that the trial court's findings are not clearly erroneous.

*III. Child Support*

Appellant argues that the trial court did not order her to pay child support in the temporary order of custody filed August 16, 2006. She acknowledges that she had a legal and moral duty to support her minor children regardless of the existence of a support order. *See Fonken v. Fonken*, 334 Ark. 637, 976 S.W.2d 952 (1998). She argues that the decision of the trial judge to award appellee judgment for support was clearly erroneous because there was evidence that she supported her children. She argues that she had checks that totaled $2,369.91 and receipts for clothing and other items where she paid cash totaling $2,390.53. The sum of these is more than the judgment of $4304 she was ordered to pay in retroactive child support. Therefore, she claims it was against the preponderance of the evidence and clearly erroneous and should be set aside.

Appellee argues that under Arkansas Code Annotated section 9-14-105(c), a court may enter judgment for support upon a preponderance of the evidence for the amount of support owed and unpaid. The trial court noted that appellant did for the children what anyone does

as a non-custodial parent, such as taking them out to eat, taking them places, and buying them Christmas and birthday gifts. The trial court acknowledged that appellant bought the children clothes when they were with her. The trial court found that those things did not constitute support as contemplated under Arkansas Code Annotated section 9-14-105(c). We hold that the trial court's findings in this regard are not clear error. Accordingly, we affirm.

Affirmed.

HART and HEFFLEY, JJ., agree.